Before the
Federal Communications Commission
Washington, D.C. 20554

In The Matter of The Applications of	)	
	)	
Green Bay Broadcasting Company, Inc., Assignor	)	
	)	File Nos. BAL-20011016AAH
And	)	And BALH-20011016AAI
	)	
Cumulus Licensing Corp., Assignee	)	
	)	
For Consent to Assignment of Licenses of WDUZ(AM) and WQLH(FM) Green Bay, Wisconsin	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 2002 **Released: July 3, 2002**

By the Commission: Commissioner Copps dissenting and issuing a statement.

1. In this order, we consider the above-captioned applications of Cumulus Licensing Corp. ("Cumulus") to acquire the licenses of stations WDUZ(AM) and WQLH(FM), Green Bay, Wisconsin (the "Green Bay Stations") from Green Bay Broadcasting Company, Inc. ("GBBC"). Because these applications were pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317 ("*Local Radio Ownership NPRM*"), we resolve the competition concerns raised by these applications pursuant to the interim policy adopted in that notice.[1] These applications are uncontested. After reviewing the record, we find that grant of these applications is consistent with the public interest.

I. INTRODUCTION

2. 2. For much of its history, the Commission has sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market.[2] In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rule in accordance with Congress' directive in Section 202(b) of the Telecommunications Act of 1996.[3] Since then, the Commission has granted thousands of assignment and transfer of control applications

[1] *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19894-97 ¶¶ 84-89 (2001).

[2] *See generally id*. at 19862-70 ¶¶ 3-18.

[3] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 202(b); 47 C.F.R. § 73.3555(a)(1).

proposing transactions that complied with the new limits. In certain instances, however, the Commission has received applications proposing transactions that would comply with the new limits, but that nevertheless would produce concentration levels that raised significant concerns about the potential impact on the public interest.

3. In response to these concerns, the Commission concluded that it has "an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest."[4] In August 1998, the Commission also began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concerns.[5] Under this policy, the Commission flags proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market.[6] The public notice for a flagged transaction indicates that the Commission intends to subject the proposed transaction to further competitive review and seeks comments from the public on that issue.[7]

4. On November 8, 2001, we adopted the *Local Radio Ownership NPRM*. We expressed concern that "our current policies on local radio ownership [did] not adequately reflect current industry conditions" and had "led to unfortunate delays" in the processing of assignment and transfer applications.[8] Accordingly, we adopted the *Local Radio Ownership NPRM* "to undertake a comprehensive examination of our rules and policies concerning local radio ownership" and to "develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition."[9] In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define

[4] *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 ¶ 8 (1999) (citing 47 U.S.C. § 309(a) and *KIXK, Inc.*, 13 FCC Rcd 15685 (1998)). *See also Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶ 12-16 (1996).

[5] *See* Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

[6] *See AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

[7] *See generally Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 18. A flagged public notice includes the following language:

> Note: Based on our initial analysis of this application and other publicly available information, including advertising revenue share data from the BIA database, the Commission intends to conduct additional analysis of the ownership concentration in the relevant market. This analysis is undertaken pursuant to the Commission's obligation under Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), to grant an application to transfer or assign a broadcast license or permit only if so doing serves the public interest, convenience and necessity. We request that anyone interested in filing a response to this notice specifically address the issue of concentration and its effect on competition and diversity in the broadcast markets at issue and serve the response on the parties.

[8] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 19.

[9] *Id.*

and apply our traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

5. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to "guide [our] actions on radio assignment and transfer of control applications pending a decision in this proceeding."[10] Although we recognized the need to "handle currently pending radio assignment and transfer applications and to address any future applications filed" while the *NPRM* is pending, we disavowed any intent to prejudge the "ultimate decision" in the rulemaking and rejected any "fundamental" changes to our current policy pending completion of the rulemaking.[11]

6. Under our interim policy, "we presume that an application that falls below the [50/70] screen will not raise competition concerns" unless a petition to deny raising competitive issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission's staff to "conduct a public interest analysis," including "an independent preliminary competitive analysis," and sets forth generic areas of inquiry for this purpose.[12] The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competitive concerns.

7. We decide the application before us pursuant to our interim policy. Under our interim policy, we first conduct a competition analysis of the proposed transaction. Here, we find that the proposed transaction raises potentially serious competition concerns in the Green Bay, Wisconsin Arbitron radio metro ("Green Bay metro")[13] because Cumulus would have up to a 34.3 percent radio advertising market share and the top two station groups – Cumulus and Midwest Communications, Incorporated ("Midwest Communications") – would have up to an 87.3 percent radio advertising market share. In this case, however, the record also supports the continued presence, post-transaction, of a third strong competitor and other viable stations that render unlikely either unilateral or coordinated anticompetitive behavior. We find that these competitive characteristics of the Green Bay metro make it unlikely that the proposed transaction will cause adverse effects that are inconsistent with the public interest. We therefore grant the application to permit Cumulus to acquire WDUZ(AM) and WQLH(FM) from GBBC.

II. BACKGROUND

8. Cumulus currently is the licensee of two stations in the Green Bay metro: (1) WOGB(FM), Kaukauna, Wisconsin and (2) WJLW(FM), Allouez, Wisconsin (the "Cumulus Stations"). Through its proposed acquisition of WDUZ(AM) and WQLH(FM), Cumulus would own three FM stations and one AM station in the Green Bay metro.

9. On November 1, 2001, the Commission issued a public notice indicating that the Cumulus applications had been accepted for filing.[14] The public notice also "flagged" the applications pursuant to the Commission's "50/70" screen. Based on Year 2001 revenue estimates from the BIA

[10] *Id.* at 19894 ¶ 84.

[11] *Id.*

[12] *Id.* at 19895 ¶ 86.

[13] A metro is a metropolitan area defined by the Arbitron rating service and used by radio stations and radio advertisers in negotiating and determining advertising rates.

[14] *See Public Notice*, Broadcast Applications, Report No. 25103 (rel. Nov. 1, 2001).

database,[15] the four stations that Cumulus proposes to own account for a 34.3 percent revenue share in the Green Bay Arbitron metro. Post-consummation, Cumulus and Midwest Communications would collectively control 87.3 percent of the advertising revenue in the Green Bay metro.

10. There were no comments filed in response to the flagged public notice. The Mass Media Bureau sent an inquiry letter on March 25, 2002, providing the parties an opportunity to update the record in light of competitive changes that might have occurred in the Green Bay market and in light of the interim policy.[16] In response to this letter, Cumulus filed additional materials concerning the potential competitive impact of the proposed transaction.[17]

III. DISCUSSION

A. Framework for Analysis Under Interim Policy

11. Section 310(d) of the Communications Act of 1934, as amended (the "Communications Act"), requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of GBBC's radio broadcast licenses to Cumulus before the assignment may occur.[18] We are making that finding in this case pursuant to the interim policy laid out in the recently issued *Local Radio Ownership NPRM*.[19] Under the interim policy, we conduct a public interest analysis, including but not limited to an independent preliminary competition analysis of the proposed transaction based on publicly available information and information in the Commission's records.[20]

12. Under the interim policy, to decide whether a proposed assignment serves the public interest, we first determine whether it complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules, including our local radio ownership rules. If it does, we then consider any potential public interest harms of the proposed transaction as well as any potential public interest benefits to determine whether, on balance, the assignment serves the public interest.[21]

13. The Commission's analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the Department of Justice or the Federal Trade

[15] BIA is a communications and information technology investment banking, consulting and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries.

[16] Letter from Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau, to David D. Burns *et al*. (dated Mar. 25, 2002).

[17] *See* Response to Inquiry Letter of Cumulus Licensing Corp. to Peter H. Doyle, Esq., Chief, Audio Division (dated April 15, 2002) ("Cumulus Response").

[18] 47 U.S.C. § 310(d).

[19] *See Local Radio Ownership NPRM,* 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[20] *Id*. at 19895-96 ¶ 86.

[21] *Id.* at 19895 ¶ 85; *see VoiceStream Wireless Corp.*, Memorandum Opinion and Order*,* 16 FCC Rcd 9779, 9789 ¶ 17 (2001); *see also Chet-5 Broadcasting, L.P.*, 14 FCC Rcd at 13043 ¶ 8 (holding that the Commission has "an independent obligation to consider whether a proposed pattern of radio station ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local market and thus would be inconsistent with the public interest").

Commission, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition"[22] in the advertising market, our focus is different.[23] Our analysis of radio license assignments is informed by how those antitrust experts look at competition issues, yet our authority arises out of the Communications Act, which is not concerned solely with the potential impact of economic concentration on advertisers, but ultimately seeks to maximize the utility that the public derives from the public airwaves. The Commission's public interest evaluation is therefore not limited to competition concerns but necessarily encompasses the "broad aims of the Communications Act."[24] These broad aims include, among other things, ensuring the existence of an efficient, nationwide radio communications service available to everyone and promoting locally oriented service and diversity in media voices.[25] Our public interest analysis therefore includes assessing whether the transfer will affect the quality of radio services or responsiveness to the local needs of the community,[26] and whether it will result in the provision of new or additional services to listeners.[27]

14. Thus, under our interim policy, where a proposed transaction raises concerns about economic concentration, we will consider evidence that the particular circumstances of a case may mitigate any adverse impact that might otherwise result, as well as any evidence of benefits to radio listeners that might result from the proposed transaction. Ultimately, it is the potential impact of the transaction on listeners that will determine whether we can find that, on balance, grant of a particular radio station assignment or transfer of control application serves the public interest.

[22] 15 U.S.C. § 18.

[23] Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. *See FCC v. RCA Communications,* 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure."). *See also RCA Communications,* 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.,* 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

[24] *See AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999); *WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030-31 ¶ 9 (1998) ("*Worldcom-MCI Order*").

[25] For example, the Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

[26] *See Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 994-97 (1981); *Sixth Report and Order*, Docket No. 8736, 1 RR 91:559, :624 (1952).

[27] *See*, *e.g.*, *Worldcom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

B. Local Radio Ownership Rules

15. The Commission's local radio ownership rules restrict the number of radio stations in the same service and the number of stations overall that may be commonly owned in any given local radio market.[28] A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.[29] Under the rules, as amended by the Telecommunications Act of 1996, in a local radio market with 45 or more commercial radio stations, a single entity may own up to eight commercial radio stations, no more than five of which are in the same service; in a market with 30 to 44 commercial radio stations, one owner may hold up to seven commercial radio stations, no more than four of which are in the same service; in a market with 15 to 29 stations, a single owner may own up to six stations, no more than four of which are in the same service; and in a market with 14 or fewer stations, one owner may hold up to five stations, no more than three of which are in the same service, except that no single entity may control more than 50 percent of the stations in such a market.[30]

16. We find that Cumulus' proposed acquisition of the Green Bay Stations is consistent with the numerical limits in our local radio ownership rules. Cumulus' multiple ownership showing indicates that, using the Commission's current definition of "radio market,"[31] the transaction creates one radio market, composed of 21 radio stations. In this market, a single licensee may, therefore, own up to 6 radio stations, not more than 4 of which are in the same service (AM or FM). If Cumulus acquires the Green Bay Stations, Cumulus will own 4 stations (1 AM/3 FM) in the market. The transaction therefore complies with the multiple ownership rules.

C. Public Interest Analysis Under Interim Policy

17. In the interim policy, we stated that, consistent with precedent, we will continue to examine the potential competitive effects of proposed radio station combinations. Competition analysis requires us to define at the outset the relevant product and geographic markets in which the radio stations compete. We must also determine the market shares and concentration levels that the proposed transaction would produce. Ultimately, we must weigh the potential competitive benefits and harms, as well as other public interest benefits and harms, that the proposed transaction is likely to produce to determine if, overall, grant of the underlying application would be consistent with the public interest.

18. *Relevant Product Market*. For the purposes of this competition analysis, we must first define the relevant product and geographic markets. Under our interim policy, we presume that the relevant product market is radio advertising.[32] Cumulus asserts that radio advertising faces substantial competition from other advertising outlets, including, broadcast television, cable, newspaper, outdoor

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28 47 C.F.R. § 73.3555(a).

29 *Id.*; *see Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

30 *See supra* note 3.

31 *See Definition of Radio Markets*, Notice of Proposed Rule Making, 15 FCC Rcd 25077, 25077-78 ¶¶ 2-3 (2000).

32 *Local Radio Ownership NPRM*, 16 FCC Rcd at 19895 ¶ 86.

advertising, telephone directories, and other print media.[33] Cumulus claims that many, if not most, of the advertisers on the Cumulus Stations also use print and/or broadcast or cable television.[34]

19. Under standard competition analysis, alternative media would be included in the relevant product market only if their presence would preclude a hypothetical monopolist of radio advertising from profitably raising prices by a "small but significant and nontransitory" amount.[35] In markets such as radio advertising, where individually negotiated contracts and repeated interaction between buyers and sellers facilitate price discrimination, determining the relevant product market can be more complicated. Standard competitive analysis provides that where there is price discrimination, we look at those buyers that do not consider other media to be good substitutes for radio advertising.[36] Here, assuming a single firm monopolized the radio advertising market and raised its prices, certain types of advertisers may switch to alternative media when faced with a price increase in radio advertising. Other advertisers may view radio advertising and advertisements on other media not as substitutes but rather as complements. Another group of advertisers may, for reasons relating to price, the type of product offered, and the desired customer, believe that only other radio stations offer close substitutes. No empirical or otherwise credible evidence is supplied to distinguish between these types of advertisers or suggest that radio advertising is not a proper product market. Accordingly, we will rely on our presumptive product market definition in evaluating this application.

20. *Relevant Geographic Market*. As in the case of product markets discussed above, to determine the relevant geographic market, standard antitrust analysis evaluates whether a hypothetical monopolist in a particular geographic area could profitably raise prices by a "small but significant and nontransitory" amount.[37] Under our interim policy, we presume that the relevant geographic market is the Arbitron metro, here the Green Bay metro, comprised of Brown County, Wisconsin. Cumulus asserts that Arbitron metro areas do not reflect market realities because they generally do not correspond to the geographic areas in which radio stations compete for advertising revenues.[38] Cumulus maintains that the Commission's presumption is particularly inappropriate in an area such as Green Bay, due to the close proximity of other population centers. Cumulus does not, however, identify an alternative geographic area.

21. In a monopolist scenario with price discrimination, described more fully below, it is likely that a large number of Green Bay advertisers would find few stations outside the Green Bay metro, other than those out-of-market stations identified as participants below, as cost-effective alternatives for Green Bay metro stations. In markets susceptible to price discrimination, determining the relevant

[33] *See* Cumulus Response at 5.

[34] *See id.* Cumulus identifies Van Boxtel Ford, Broadway Automotive, McDonald's, Burger King, Van's Heating and Cooling, Verizon Wireless, Cellcom, Van Vreede's Furniture and Appliance, Gerondale's Home Furnishings, and Gateway as advertisers who use multiple media platforms in the Green Bay metro. *Id.*

[35] *See*, *e.g.*, *Horizontal Merger Guidelines*, issued by U.S. Department of Justice & Federal Trade Commission, April 2, 1992, revised April 8, 1997 ("*Horizontal Merger Guidelines*"), §§ 1.1, 1.12.

[36] *See id.* § 1.12. Staff and DOJ analysis of radio transactions suggests that existing buyers of radio advertising differ significantly in their likelihood of switching to other media in response to a "small but significant and non-transitory" price increase for radio advertising.

[37] *See Horizontal Merger Guidelines* § 1.2.

[38] *See* Cumulus Response at 5.

geographic market can be difficult.[39] Here, assuming a single firm monopolized the radio advertising market in the Green Bay metro and raised its prices, certain types of advertisers, predominantly regional and national advertisers may find certain out-of-market radio stations, sufficient alternatives. Given that a number of out-of-market stations have listening audiences in Green Bay, regional or national radio advertisers are unlikely to be solely dependent on Green Bay metro radio stations to reach their targeted audience. Therefore, a Green Bay monopolist would find it unprofitable to charge supracompetitive prices to regional or national advertisers. On the other hand, local Green Bay advertisers, *i.e.*, those seeking to focus their advertising on potential customers located in the city of Green Bay or Brown County, may find few, if any, stations in other metro markets acceptable alternatives. This is because such advertisers may have to pay significantly higher rates to reach a large share of the target audience when using stations in other markets.

22. We treat as a geographic market an area where radio advertisers seeking to reach the listening audience only in that area will likely face the same competitive alternatives. We believe that, in most cases, the Arbitron metro, or its functional equivalent, is the relevant geographic market for assessing the competitive effects of a proposed transaction.[40] To date, we have consistently used this market definition in evaluating the competitive effects of radio mergers.[41] In light of these facts, we conclude that local Green Bay advertisers would not find a sufficient number of outlets, outside of the Green Bay metro participants, so as to render unprofitable a small but significant and nontransitory price increase by a hypothetical monopolist of radio stations that serve Green Bay metro. We find that there is no evidence in this case to rebut the presumption that the Green Bay metro, defined by Brown County in Wisconsin, comprises the relevant geographic market.

23. *Market Participants*. In addition to the Cumulus Stations and WDUZ(AM) and WQLH(FM) (the Green Bay Stations), the following commercial band radio stations are reported by BIA as having their home market in the Green Bay metro: (1) WAUN(FM), Kewaunee, Wisconsin, owned by Magnum Radio; (2) WGEE(AM), WNFL(AM) and WIXX(FM), Green Bay, Wisconsin, and WLTM(FM),[42] Sturgeon Bay, Wisconsin, all owned by Midwest Communications; and (3) WKSZ(FM), DePere, Wisconsin, and WZOR(FM), Mishicot, Wisconsin, both owned by Woodward Communications ("Woodward").

24. Cumulus asserts that limiting the market participants to only "home" metro stations likely understates the number of radio signals penetrating the market and competing for advertising revenues.[43] Cumulus notes that an additional 22 radio stations are listed as out-of-market stations for the Green Bay metro.[44] Cumulus asserts that Woodward's WAPL(FM), with its signal coverage and audience reach,

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[39] *See Horizontal Merger Guidelines* § 1.22.

[40] Our presumption regarding the Arbitron metro is consistent with the approach taken by the antitrust authorities. The DOJ has, in reviewing radio mergers, generally relied on the Arbitron metro as the appropriate geographic market.

[41] Use of this definition appears consistent with the three factors that we believe are particularly critical in determining a relevant geographic market, namely, (1) industry recognition, (2) geographic coverage of broadcast signals, and (3) customer demand.

[42] According to our database, this call sign has been changed to WLYD(FM).

[43] *See* Cumulus Response at 6.

[44] *See id.*

consistently has been and remains a major competitive force in the Green Bay metro and sells a substantial volume of advertising to businesses located in Brown County, Wisconsin.[45]

25. Generally, a radio station may participate in a market even if its city of license is located outside of the county that defines the market, as long as the station's advertising customer base, contours, listening audience, and other relevant factors indicate that it "currently produces or sells" in the relevant market or is an "uncommitted entrant[]" in that market.[46] A number of stations that are identified by BIA as Appleton-Oshkosh metro stations have contours that reach the Green Bay metro and have listening share in the Green Bay metro. In addition, a number of these stations are owned by group owners who have existing sales forces in the Green Bay metro. As discussed further below, we agree with Cumulus that certain of the out-of-market stations, *i.e.,* stations whose communities of license are outside the Green Bay metro, may be considered as Green Bay metro participants.

26. Brown County, which, as noted above, defines the Green Bay metro, is adjacent to Outagamie County, in which the city of Appleton is located. The Appleton-Oshkosh metro is comprised of Outagamie, Calumet and Winnebago counties, with the city of Oshkosh in Winnebago County. Appleton and Oshkosh are, respectively, approximately 30 miles and 50 miles from Green Bay. BIA reports (for 2001) a population of 229,200 for Brown County, 162,500 for Outagamie County, and 158,000 for Winnebago County. Due to Appleton's close proximity to Green Bay and the comparable size of the potential audience in Brown County compared to Outagamie County, Outagamie County stations that have significant audiences in the Green Bay metro could, at reasonably low cost, offer Green Bay advertisers time on their stations.

27. According to BIA, 15 out-of-market stations had a reportable listening share in the Green Bay metro in the Fall 2001 ratings period.[47] Of those 15 stations, eleven are home to the Appleton-Oshkosh metro. Cumulus owns two such Appleton-Oshkosh metro stations (WNAM(AM) and WXWX(FM)); Midwest Communications owns three such stations (WOZZ(FM), WNCY(FM), and WROE(FM)); and Woodward also owns three (WAPL(FM), WRJQ(AM),[48] and WHBY(AM)). According to BIA data, the 60 dbu signal contours of these eight stations cover significant portions of both Brown and Outagamie counties. Notably, Midwest Communications' WNCY(FM) is the second-highest rated station in the Green Bay metro. Cumulus maintains that Woodward's WAPL(FM) sells a substantial volume of advertising to Green Bay businesses.[49] All three of these owners have a local sales force in the Green Bay metro. In light of these circumstances, we conclude that at least these eight stations owned by the three large Green Bay group owners are likely to sell significant amounts of advertising time to businesses located in Brown County, *i.e.*, the Green Bay metro. As such, they can be included as participants in the metro, either as current competitors or as "uncommitted entrants."

28. Three of the 15 out-of-market stations that received a listening share in the Green Bay metro in Fall 2001 are not home to any metro. These stations are: WSFQ(FM), Peshtigo, Wisconsin,

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[45] *See id.* According to BIA, WAPL(FM) is home to the Appleton-Oshkosh metro.

[46] *See Horizontal Merger Guidelines* §§ 1.31, 1.32. Under these *Guidelines*, an uncommitted entrant is a firm that is likely to enter the market "within one year and without the expenditure of significant sunk costs of entry and exit, in response to a 'small but significant and nontransitory' price increase." *Id.* § 1.32.

[47] Similarly, eight of the eleven stations home to the Green Bay metro, including all of the Cumulus Stations, had a reportable share in the Appleton-Oshkosh metro.

[48] According to our database, this call sign has been changed to WSCO(AM).

[49] *See* Cumulus Response at 6.

owned by Badger Communications; WBDK(FM), Algoma, Wisconsin, owned by Nicolet Broadcasting; and WRVM(FM), Suring, Wisconsin, owned by WRVM Inc. These stations have a small audience share in the Green Bay metro and do not receive a reportable share in any other Arbitron metro. They would, therefore, likely have the ability to offer local Green Bay advertisers some Green Bay metro listenership at relatively low advertising rates. Consequently, they too can be included as either current competitors or as "uncommitted entrants" in the Green Bay metro.

29. Market share and market concentration. Under the interim policy, we presume that BIA revenue share estimates accurately reflect actual market shares. According to BIA, radio stations that are home to the Green Bay metro generate $11.8 million in radio advertising revenues. Using BIA data for Year 2001, the pre-transaction market structure in the Green Bay metro is as follows:

	Market Share	Market Revenue
Cumulus	11.9%	$1,400,000
Green Bay Broadcasting	22.5%	$2,650,000
Midwest Communications	53.0%	$6,250,000
Woodward	12.7%	$1,500,000
Total	100%	$11,800,000

Based on these BIA revenue estimates for 2001 for the Green Bay metro, after the transaction, Cumulus would have a revenue share of 34.3 percent. We also calculate a listening share of 42.6 percent for Cumulus, post-transaction.[50] The proposed transaction will result in an increase in the HHI for the Green Bay metro of 533, with a total post-transaction HHI of 4,145.[51]

30. Although Cumulus maintains that the market share data in general are skewed, it does not provide reliable alternative market share calculations or data. Cumulus proposes only one specific adjustment to the revenue estimates. Cumulus notes that its records indicate combined 2001 revenues for the Cumulus Stations in the Green Bay metro of $3,911,000 rather than the BIA estimate of 4,050,000.[52] While we acknowledge that BIA only provides revenue estimates for stations and Arbitron metro areas, we find that in this instance the most reliable share information available remains the presumed market shares calculated above. We have no reason to question the accuracy of the submission with respect to the Cumulus Stations, but we decline to adjust the revenue figure for only one owner's stations. Without actual revenues for most of the substantial participants in the metro, it would be inconsistent to use actual revenues for some stations and BIA estimates for others. In addition, this one adjustment does not significantly alter market shares or our overall assessment of competition concerns. Moreover, a revenue share calculation is but one factor related to an analysis of competition.[53]

31. Cumulus argues that the methodology for measuring market shares is flawed because it only uses revenues for stations "home" to the Arbitron radio metro. Cumulus asserts that such a methodology "generally overstates the revenue shares of 'home' stations within a given Arbitron metro by including out-of-metro advertising revenues of such 'home' stations, while excluding in-metro

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[50] *See infra* ¶ 32.

[51] Making Cumulus' proposed revenue adjustment for its stations to $3.911 million would change the post-consummation HHI for the Green Bay metro to 4,163.

[52] *See* Cumulus Response at 6, n.4. Cumulus states that adjusting the Cumulus Stations, without making any other adjustments, would lower the post-acquisition revenue share slightly, to approximately 33.5 percent. *Id.*

[53] *See Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145, 11151 ¶ 16 (1999).

advertising sales by certain 'below-the-line' stations."[54] Specifically, Cumulus notes that BIA estimates for the Green Bay metro do not take into account any portion of the estimated $3 million in advertising revenues for Woodward's WAPL(FM), despite its significant signal coverage, audience share, and sales activities in Green Bay/Brown County.

32. As discussed in the "Market Participants" section above, we believe the evidence in this instance supports the inclusion of certain out-of-market stations. However, reliable revenue information regarding the out-of-market stations' advertising sales solely to Green Bay advertisers is not available.[55] As an alternative, we can analyze listening audience shares, which can give some indication of likely revenue shares.[56] Including all the stations identified above as market participants, using the Fall 2001 Arbitron listening data which reflect both in-metro and out-of market stations, we calculate the following listening shares in the Green Bay metro: 34.7 percent for Cumulus; 42.5 percent for Midwest Communications; 18.9 percent for Woodward; and 3.9 percent for the remaining market participants. These listening shares are taken into account in our analysis, below, of the potential for harm to advertisers and listeners as a result of this transaction.[57]

33. *Conditions of Entry.* We consider evidence regarding the possibility of entry by new stations, as well as any barriers to entry, and the timeliness, likelihood, and sufficiency of entry to counter any potential market power. Cumulus did not conduct a detailed analysis to determine the entry possibilities in the Green Bay metro.[58] Cumulus asserts that such an analysis is unnecessary given the lack of evidence of any significant anticompetitive effects.[59] While new entry and station relocation is possible in some radio markets, the record in this case does not support a conclusion that there is sufficient new capacity available in the form of potential entry and/or station relocation that could come forward to offset potential adverse competitive effects should Cumulus attempt to exercise market power following the proposed transaction.

34. *Potential Adverse Competitive Effects: Unilateral and Coordinated Effects.* The creation of a dominant firm or a near-duopoly market structure increases the risk of inefficient price discrimination,[60] unilateral advertising price increases, and of collusive behavior, including the division of advertising accounts. Cumulus argues that the proposed transaction will not harm advertisers or listeners because WDUZ(AM) and WQLH(FM) have been operated by Cumulus pursuant to a local marketing

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[54] *See* Cumulus Response at 7. In this *Order*, we refer to "below the line" stations as "out-of-market" stations.

[55] The publicly available BIA database does not estimate station revenues on a metro by metro basis.

[56] We note that there is rarely a one-to-one relationship between audience share and revenue share, but radio stations earn the bulk of their advertising revenue by "delivering" listeners to the advertisers. Arbitron's estimates of audience shares are based on regular surveys of listeners and are commonly used by both radio broadcasters and advertisers in their negotiations of advertising rates.

[57] Using only in-metro station data, post-transaction, Cumulus has a 42.6 percent listening share, Midwest has a 37.6 percent listening share, Woodward has a 17.9 percent listening share, and Magnum Radio, who owns Green Bay metro station WAUN(FM), has a 1.9 percent listening share. We generally do not rely on in-metro listening shares when reliable revenue estimates are available.

[58] *See* Cumulus Response at 10.

[59] *See id.*

[60] *See FTC v. Heinz*, 246 F.3d at 715-16.

agreement ("LMA") since September 1999.[61] Cumulus states that the efficiencies and public interest benefits derived from combined operation of these stations under an LMA[62] proves that the proposed ownership consolidation is procompetitive and will strongly benefit radio broadcast service to listeners in the Green Bay metro.[63] Cumulus further argues that there arguably will be no substantive change in HHI resulting from grant of the assignment application, merely a change from common operation to common ownership.[64]

35. We are not persuaded by Cumulus' argument that the proposed transaction will not adversely impact competition and will increase competition just because Cumulus has operated the stations it seeks to acquire pursuant to an LMA for some time. There is no substantial evidence on the record from which we might conclude that no adverse effects have resulted from the aggregation of economic power attributable to Cumulus' LMA relationships or that this aggregation of economic power has increased competition. We note, in this regard, that this is the first opportunity the Commission will have had to consider any such effects because we do not currently review LMAs when they are entered.

36. Cumulus asserts that the unilateral effects on competition of the proposed transaction are likely to be insignificant. Cumulus maintains that any exercise of market power by Cumulus is highly unlikely here given its "relatively small" (below 40 percent) post-merger market share, the fact that Cumulus will continue to face close competitors against both WDUZ(AM) and WQLH(FM) and in the same format areas (Contemporary Hits Radio and News/Talk/Sports, respectively), and the ease of format switching by competitors.

37. We find that certain specific factors in this case alleviate any significant concerns with respect to the creation of unilateral market power. Post-transaction, Cumulus will own three FM stations and one AM station in the eleven-station (eight FM and three AM) Green Bay metro, garnering a 34.3 percent revenue share according to BIA, as noted above. Based on Fall 2001 Arbitron listening data, which as discussed above, takes into account out-of market stations as well, Cumulus will own four of the top ten stations measured by listening audience in the Green Bay metro. Midwest Communications owns the two highest-rated stations and one other top-ten rated station in the metro. Woodward also owns three of the top-ten stations in the Green Bay metro. As such, Cumulus will not have a dominant position with respect to revenue share, facilities or top-rated stations. These factors indicate that advertisers will continue post-transaction to have sufficient alternatives to the Cumulus-owned stations so as to render future unilateral price increases unprofitable. Therefore, we conclude that significant unilateral anticompetitive effects due to the proposed transaction are unlikely.

38. With respect to coordinated behavior, Cumulus asserts that Woodward is a viable third competitor and that "Woodward becomes an even more viable third radio group when its WAPL(FM), Appleton, Wisconsin, station is considered."[65] The record supports Cumulus' assertion that there will remain three viable competitors serving radio advertisers, including local radio advertisers, in the Green Bay metro. Also, as discussed above, we agree that Woodward's WAPL(FM) participates in the Green Bay metro, and a number of other stations as well are likely competitors in the Green Bay metro.[66] We

[61] *See* Cumulus Response at 2.

[62] *See infra* ¶¶ 41-42.

[63] *See* Cumulus Response at 2.

[64] *See id.* at 8.

[65] *See* Cumulus Response at 6.

[66] See ¶ 27, *supra*.

conclude that Woodward's three Appleton-Oshkosh metro stations, which we concluded above can be counted as participants in the Green Bay metro, make Woodward a stronger competitor than the market revenue share calculations suggest. In addition, Green Bay metro station WAUN(FM), owned by Magnum Radio, and three nearby stations outside of any Arbitron metro[67] offer advertisers options beyond the three largest groups in the Green Bay metro. Moreover, there is no indication of collusion in the record. In the presence of a third strong competitor and other viable stations, we find that anticompetitive coordinated behavior is unlikely. We therefore find that the proposed transaction does not create significant competition concerns with respect to either national, regional or local Green Bay metro advertising markets.

39. Generally, because we believe that the economic incentives inherent in a fully functioning competitive market are the most effective way to maximize listener benefits, the potential harm to advertisers implicates our public interest concerns. Absent a finding of harm to advertisers, we find that it is unlikely that listeners will be harmed by the subject transaction. Under these circumstances, we conclude that the evidence in the record does not raise a substantial and material question of fact regarding the potential adverse impact of the proposed transaction on advertisers or listeners.

40. *Efficiencies and other public interest benefits.* Under the interim policy, we consider evidence of economic efficiencies that the proposed transaction would produce and public interest benefits the proposed transaction would provide listeners or advertisers, such as improvements in the quality, scope and quantity of community responsive programming, improved community service, and the furtherance of localism. Parties asserting that a proposed transaction will produce efficiencies and other public interest benefits are required to show both how the transaction will produce those benefits and how those benefits will flow through to listeners or advertisers. Cumulus argues that, while offsetting efficiency gains are not necessary since the combination does not adversely affect competition, a number of cognizable efficiencies have been created by the LMA.[68] Cumulus identifies cost-savings due to the sharing of facilities and consolidation of management and personnel functions.[69] Cumulus also asserts that new computer hardware and software, improved engineering and studio facilities are a direct result of combined operations.[70] Cumulus believes that these investments have improved the quality of programming and other service to the listening public.[71]

41. Cumulus further maintains that it has made WDUZ(AM) and WQLH(FM) more attractive to listeners through format changes, consistent market research, and increased live local programming.[72] Cumulus also asserts that there has been a significant increase in the stations' community involvement under the Cumulus LMA.[73] Cumulus claims, moreover, that advertisers benefit from Cumulus' LMA for WDUZ(AM) and WQLH(FM) through improved programming and advertising spot quality, and new options such as "cluster remote" packages and "cluster spot" packages.[74] Finally,

[67] *See* ¶ 28, *supra*.

[68] *See* Cumulus Response at 10.

[69] *See id*. at 11.

[70] *See id.*

[71] *See id.*

[72] *See id.* at 14.

[73] *See id.*

[74] *See id.*

Cumulus maintains that it has introduced multi-station discounting to the market, which is now becoming available through the other groups in the Green Bay metro as well.[75]

42. We find the cost-savings and public interest benefits described above are relatively modest in nature and scope. Moreover, Cumulus does not provide a full explanation of why the potential benefits cannot be achieved absent this transaction. In this case, however, we need not examine Cumulus' public interest showing further because we have found no public interest harms.

IV. CONCLUSION

43. Based on the foregoing analysis, we find no substantial and material question of fact as to the effect of the proposed transaction on competition that would warrant further inquiry. In addition, we have reviewed the assignment applications and find that Cumulus is qualified to be the licensee of WDUZ(AM) and WQLH(FM) and that grant of the transaction is consistent with the public interest, convenience and necessity.

V. ORDERING CLAUSES

44. ACCORDINGLY, IT IS ORDERED, That the application to assign station WDUZ(AM), Green Bay, Wisconsin, from Green Bay Broadcasting Company, Inc. to Cumulus Licensing Corp. (File No. BAL-20011016AAH) IS GRANTED.

45. IT IS FURTHER ORDERED, That the application to assign station WQLH(FM) Green Bay, Wisconsin, from Green Bay Broadcasting Company, Inc. to Cumulus Licensing Corp. (File No. BALH-20011016AAI) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[75] *See id.*

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

In the Matter of the Application of Green Bay Broadcasting Company, Inc. and Cumulus Licensing Corp. for Consent to Assignment of Licenses of WDUZ(AM) and WQLH(FM)

As a result of this transaction, the top two station groups in Green Bay, Wisconsin will control a total of 87.3% of the revenues in the radio market, giving rise to what the majority calls "potentially serious competitive concerns." While the majority finds that the remaining station group with 12.7% of the revenues will be a strong competitor to the two larger groups, I respectfully disagree. To the extent that the majority's approval of this transaction rests upon the competitive discipline created by a third competitor in the market, I question how rigorous this discipline may be, and whether this grant is consistent with the public interest.